

JULY 3. 1766.

A N S W E R S

F O R

HUGH SMITH, Grandson of the deceased *Hugh Morton Miller at Towermill*, and *Robert Smith Taylor in Ayr*, his Factor;

T O T H E

PETITION of Poor *William Mackay*, Journeyman Shoemaker in *Galsoun*.

THE apology offered for presenting this petition, is,
 “ That altho’ the subject in dispute is but small,
 “ yet it is all the stock the petitioner has in the
 “ world.”

The respondent knows, that no consideration of this sort will weigh with your Lordships, unless the petitioner’s pretensions shall appear to be founded upon just and solid grounds: It leads him, however, to observe, that in this respect at least, parties are pretty “ equally matched.”—The petitioner represents himself as a needy journeyman shoemaker, that will be altogether destitute of a stock, if compelled to restore what the respondent, with all submission, considers to be his just right. The respondent himself never rose above the humble sphere of a journeyman wright, and has, some time ago, left off the business intirely: Even the wages which he earned by his labour, frequently came

to

to no account, from his peculiar indolence and facility of temper, which allowed them to ly over undemanded, without document or voucher, until they became irrecoverable, thro' the death or denial of the persons owing him. In short, the whole tenor of his life, which is now pretty far advanced, has discovered a high degree of simplicity, and incapacity to conduct his affairs, which made him an easy prey to a person of cunning and address, which this petitioner's father, whatever he may pretend, was universally known to be. And was it not for the countenance and support of some of his friends, from conviction of the injustice he has met with, and who have at length prevailed with him to put the management of his little concerns, consisting of the subject of this process, and a few old debts originally due to his father, into the hands of one of their number, as his factor, that he may have wherewith to support himself in his old age, the respondent himself must have been unable to reclaim his right, without the aid of the poor's roll, which his opponent, the petitioner, has obtained; and who does publicly boast of the pleasure it gave him, that he could make a sixpence cost the respondent a pound; and consequently, render this subject, in the issue, of little or no value; "a bare bone not worth the picking," to use his own expression.

That the respondent is intitled to prevail, will, he humbly hopes, be the opinion of your Lordships, as well as of the Lord Ordinary, when the facts have been fully laid before you, without the necessity of his using much argument.

Ann Morton, daughter of the deceased *Hugh Morton* miller Sept. 24. at *Towermill*, had right, by conveyance from her said father, to an heritable bond, granted by *Charles Nicol* over 1695. his lands of *Bogball*, for the sum of 500 merks, and an adjudication deduced thereon as far back as *February 1694*, for the accumulate sum of 438 l. 6 s. 8 d. Scots.

The

The said *Ann Morton* intermarried with ——— *Smith*, the respondent's father, who soon thereafter died, leaving the respondent, their only child, an infant.

Ann Morton afterwards intermarried with one *Fisher*, and had by him several children, one of whom intermarried with *William Mackay*, father to the petitioner.

This *William Mackay* lived in family with his mother-in-law, who, while she lived, had the custody of the title deeds of the said lands; and after her death, *Mackay* took possession of them; and the respondent having been soon after his mother's second marriage, put out to an apprenticeship when very young, and living in a distant part of the country, was kept entirely ignorant of the matter.

At length, when it came to be taken notice of in the country, that the respondent was the heir to this small farm, in right of his mother, the said *William Mackay* his brother-in-law, acknowledged to him it was so; but being a very artful and designing person, and availing himself of the respondent's weakness of intellects, and remarkable timidity, frequently took opportunities of expressing his apprehensions, that the respondent's right was liable to be called in question, and might come to be set aside by the heirs of *Charles Nicol*, if some person of activity did not immediately go over to *Ireland* where they then resided, and settle matters with them, and proposed to the respondent to make over his right to him for the aforesaid purpose, telling him, that how soon he returned, he would retrocess him, upon payment of his neat expences.

In prosecution of this plan, *William Mackay* came to *Ochiltree*, a village in *Airshire*, where the respondent was employed at his work, with a disposition ready wrote out, which the respondent was prevailed upon to sign, of this date; whereby, upon the narrative of a sum of money said Mar. 16. to be paid as the value of the subjects, he disposed the 1742. whole

whole premisses to the said *William Mackay*, with procuratorry and precept, and with power to procure the respondent entered in the subjects as heir to his mother.

Feb. 11. 1743. The respondent thereafter, having applied to *William Mackay*, in order to be retrocessed, or to have proper evidence from him of the trust, *William Mackay*, of this date, granted an obligation on unstampt paper, in favours of the respondent, of the following tenor: " I *William Mackay* " mason in *Galston*, by these presents, bind and oblige me " to deliver up to *Hugh Smith* in *Monktoun*, all papers in " my custody relating to the mailin of *Boighall* belonging " to him, and that against *Whitsunday* next to come, he " paying me what expences I have been at in procuring his " right to the said mailin before the Lords, and otherways. " In testimony whereof, I have subscribed the same at " *Monktoun*, this eleventh of *February*, seventeen hundred and " forty three, before these witnesses, *John Ralstoun* wright " in *Monktoun*, and *Robert Orr* schoolmaster there, writer " hereof."

1744. Soon after the granting of this obligation, *William Mackay* died, leaving the petitioner his son, under age, who, and *Ann Fisher* his mother, continuing his father's possession of the subjects, an action was brought at the respondent's instance before the sheriff of *Air*, against the petitioner, the said *Ann Fisher* his mother, and *Ann Mackay* his sister, as representing the said *William Mackay* upon the passive titles, concluding for exhibition of the writings of the foresaid lands; and likewise for payment of a small bill due by the defunct to the pursuer.

This action was both concerted and conducted very unskilfully.—The defence of *minor non tenetur placitare*, was proponed, which had stumbled the procurator employed for the respondent, tho' plainly insignificant; and his decease soon after, joined with the respondent's own inactivity, occasioned the action to lie over for several years, when a wa-
kening

kening was raised; and afterwards, it having been contended, that the obligation produced was not on stamp paper, the sheriff, upon advising the process, found, that the defenders were not obliged to deliver up the writs produced, there being no such conclusion in the libel. Mar. 17. 1758.

However, the respondent, at length, in the 1763, upon better advice, having procured the obligation of the 11th February 1743 to be stampt, brought the present action before this supreme court, libelling upon the *species facti* as above set forth, and concluding, " That the defender should
 " be decerned and ordained, as representing his said father
 " passivè, and as lawfully charged to enter heir to him, to
 " make up proper titles in his person to the foresaid lands
 " of *Bogball*; and being so made up, to grant a valid right
 " and disposition of the same in favours of the pursuer,
 " and to exhibite and deliver up to the pursuer the foresaid
 " heritable bond, infestment, decreet of adjudication, and
 " whole writs and evidents, of and concerning the said lands;
 " and to make payment of the sum of 6 *l. sterling* yearly,
 " as the rent of the said lands, from and since the term of
 " *Whitsunday* 1742; and of the like sum yearly in time coming, during the defender's possession of the subjects, and
 " ay and while the pursuer be reponed and retrocessed in
 " his own right; and of the sum of 30 *l. Sterling* of damages and expences of process."

This cause came in course before the Lord *Alemoor* Ordinary, who after some intermediate steps of procedure, pronounced an interlocutor of this date, finding the trust libelled, instructed by the obligation produced, and therefore, ordained the defender to make up titles in his person to the subjects in question, and to denude thereof in favours of the pursuer: And his Lordship, by two subsequent interlocutors, hath adhered; but found the petitioner intitled to be reimbursed of the expences debursed, in terms of the backbond, before he be obliged to reconvey the subjects July 25. 1765.

B in

in question, and ordained him to give in an accompt thereof.

In reclaiming from these judgments, the petitioner sets out with stating some circumstances, that, in his apprehension, establish the improbability of the disposition by the respondent to his father having been granted in trust — And the *first* particular insisted on is, that your Lordships will hardly suppose the respondent, who is said to have constantly resided in the neighbourhood where the lands lie, would have allowed the petitioner, or any person in his name, for upwards of 21 years, peaceably to possess the lands which he must have known to be his property, if the disposition had been really in trust; and that the petitioner and his mother did possess the lands for that space without the least interruption; for that there never was any demand made upon the petitioner, to denude of the right of these lands, till this action was called in court in *November 1763*.

To this it is answered, That, in fact, the respondent did not reside in that neighbourhood where the lands lay; but it was his lot to go in quest of what employment he could get as a journeyman wright, which mostly carried him at a considerable distance from that quarter of the country. However, your Lordships have heard, that, as early as the 1744, an effort was made to assert his right, by the action brought for his behoof before the sheriff of *Ayr*, which indeed was lame in this respect, that there was no conclusion against the petitioner for delivery of the writings, in terms of his father's obligation or back-bond: But your Lordships will observe, that from the tenor of that obligation, it could never occur, that there was any foundation or necessity for a conclusion against him to denude, as it narrates the right to have been procured in favours of the respondent himself: And it was not known to the respondent, or his doer, till after the judicial production, that the

the petitioner's father had expedite any right in his own favours.

Another observation made by the petitioner is, That the reasons assigned by the respondent for his disposing these lands in trust to the petitioner's father, must appear very extraordinary to your Lordships, viz. That the petitioner's father might make up titles to them; and after having done so, he was to re-convey them to the respondent.

But your Lordships have heard, that the purpose of the respondent's granting the disposition, as explained to him by the petitioner's father, was in order to enable him to counter-act any attempts by the heirs of *Nicol* to carry off this subject from the respondent, and to bring about a settlement with them; for which purpose, he proposed going over to *Ireland*; and altho' no person versant in business would have become a dupe to such a scheme, yet it is no way surprising, that a person of the respondent's weak capacity did fall into the snare.

The petitioner next observes, that the disposition which the respondent granted, is full and ample, without reservation or restriction; that it bears to be for an onerous cause, and, in fact, was not granted in trust, but in consequence of an adequate price paid to the respondent by the petitioner's father, at the date thereof; and that there is no foundation for alledging that his father was a designing and artful man, or that the respondent was fraudulently induced to execute the disposition, which, tho' it has been averred, yet no article of fraud had been condescended on. And farther, the petitioner observes, that the date of his father's obligation is 11 months posterior to the date of the disposition; which, it is said, could not possibly have been the case, had the disposition been in trust: And your Lordships are told, that it was upon the respondent's having afterwards made a clamour, as if he had sold the lands at too easy a rate, that the petitioner's father offered to give him up his right, and to put him again in possession of the lands, on his being reimbursed of the price he had paid,
and

and expences incurred ; and that, in pursuance thereof, he granted the inaccurate obligation now founded on by the respondent.

To which it is answered, *1mo*, That the disposition by the respondent in favours of the petitioner's father, contains only warrandice from fact and deed, which is very inconsistent with the idea of a sale. *2do*, Had it been necessary in the present case, the respondent could have proved by the instrumentary witnesses, that so far from a full and adequate price having been paid by the petitioner's father for these lands, *de facto*, not a shilling was paid to the respondent at granting the disposition ; and that it was by no means understood to be a sale : On the contrary, the respondent indorsed him two bills, in order to defray the charges he might be put to : He could also have proved by the concurring voice of the country, and other circumstances, that neither then, nor at any period of his life, was the petitioner's father in a situation to have paid the length of *5 l. Sterling* for a purchase. But indeed, the contrary of the petitioner's allegation, as to an adequate price having been paid, is clearly ascertained by the foresaid obligation, ascertaining the trust ; and, as that is the case, your Lordships will pay no regard to the narrative of the disposition. *3tio*, If the respondent had not been luckily possess of the foresaid obligation, of *February 1743*, he would have been laid under the necessity of entering upon an expiscation of the circumstances of fraud and imposition, that were used in eliciting an absolute conveyance from him ; and in this the character of the two parties would have been a material ingredient, and could have been set in the light the respondent has represented them : But from this task the foresaid obligation relieved him, which clearly ascertains the trust ; and therefore, altho' in giving a deduction of the case, the respondent stated the fact as it truly was, yet he is under no necessity of resting his cause on these circumstances. *4to*, As to the space which intervened between the date of the disposition, and the granting the obligation by the petitioner's father,

father, the respondent himself entertained no diffidence of a person, with whom he stood so nearly connected, and who had professed so much zeal to serve him; but when near twelve months were elapsed, he was prompted by some friends to insist with *William Mackay*, whom they began to be apprehensive of, to put him in his own place again: And accordingly he condescended to grant the obligation in question. The account given by the petitioner, of the way and manner in which it came to be granted by his father, is altogether a fiction, and contradicted by the express terms of his own obligation, which your Lordships will observe is wholly silent with regard to restitution of the price, tho' the petitioner holds it forth to have been an express article of agreement between the parties.

The respondent having made these remarks, with respect to the several circumstances on which stress is laid in the petition, will now submit to your Lordships, if the present action is not clearly founded in the obligation of the 11th *February* 1743, granted to the respondent by the petitioner's father.

The petitioner objects to it as *inaccurate* and *informal*. With regard to informality, there can apparently ly no objection; and however inaccurately this obligation may be conceived, it needs no commentary. It ascertains the trust beyond the possibility of a doubt: The petitioner's father does thereby oblige himself to deliver up to the respondent, "all papers in my custody relating to the mailin of Bog-hall, belonging to him, and that against *Whitsunday* next to come, he paying me what expences I have been at in procuring his right to the said mailin before the Lords, and otherwise."

From the conception of this last clause it is observable, that the petitioner's father seems then to have had in view, to muster up a large account of expences, which were never given out, there having been no process before the Lords relative to that matter: But the words of the deed are abundantly broad and expressive to ascertain the trust; and indeed when the transaction was recent, and the cir-

circumstances of it known, it would have been too bold in him to have denied the trust.

And therefore, upon the whole, as the trust is clearly ascertained, even upon the most strict and literal construction of the statute 1696, the respondent hopes your Lordships will have no difficulty to adhere to the judgment complained of.

Indeed the petitioner himself does not seem to entertain much hope of success by this application, and therefore he has brought under your Lordships view another point in the cause, on supposition that he is obliged to reconvey the subjects to the respondent, which, as yet, has neither been argued upon, nor received any explicit judgment from the Lord Ordinary; and that is, how far he is liable in repetition of the rents of the subjects, during the time that he and his mother have possessed the same?

The respondent believes your Lordships will be of opinion, that the petitioner ought first to have stated to the Lord Ordinary his objections against being made liable in repetition, if he conceived that to be implied in the interlocutors pronounced by his Lordship under the word *decerns*, and to have waited his determination thereon. But, if your Lordships think it proper also to give judgment upon this question, the respondent is advised, that the petitioner, in virtue of his father's obligation, which can admit of no other construction than that of a trust, would be liable to account for the bygone rents intromitted with by his mother in his name, as it cannot be denied they have been converted to his behoof, his mother and he having had no other fund for their aliment; and both of them were conscious, and it was even the general report of the country, that these lands belonged to poor *Hugh Smith*, and were unjustly withheld from him. And the respondent does not dispute, that in accompting for the bygone rents, the petitioner have allowance of the expence of making up his, the respondent's titles, in terms of the Lord Ordinary's interlocutor.

In respect whereof, &c.

WILL. WALLACE.